No. 1804.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

The Southern Pacific Company, a corporation, et al.,
Appellants,
vs.
The Arlington Heights Fruit Company, et al.,
Appellees.

Brief of Appellants.

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BRIEF OF APPELLANTS.

STATEMENT OF THE CASE.

[Note: The figures in brackets indicate the pages of record.]

This case has its origin in a bill of complaint filed November 9, 1909 [40], by the Arlington Heights Fruit Company and fifty others, corporations, co-partnerships, and individuals [5-6], in the Circuit Court of the United States for the Ninth Circuit, Southern District of California, Southern Division, against the Southern Pacific Company, the San Pedro, Los Angeles and Salt Lake

Railroad Company, the Atchison, Topeka and Santa Fe Railway Company, the Transcontinental Freight Bureau, and some others whose true names are alleged to be unknown to appellees, to obtain an injunction as hereinafter stated [5-40].

The bill, a voluminous one, in substance alleges:

That appellees (complainants in the court below) are all citizens of California and residents of the southern district thereof [7].

That the Southern Pacific Company, San Pedro, Los Angeles and Salt Lake Railroad Company, and the Atchison, Topeka and Santa Fe Railway Company, are, respectively, citizens and residents of Kentucky, Utah and Kansas [8], and each owns and operates interstate lines of railway extending from Los Angeles to various points in states other than California [9-10].

That the Transcontinental Freight Bureau was an association of the railroad companies above named and many others, for the purpose of fixing rates on lemons for transportation from California to points outside thereof [8]. The residence and citizenship of this bureau is not stated.

That appellees are and for many years have been engaged in the growing, packing, buying and selling of lemons in California and in shipping them over appellants' lines of railway to various cities and towns throughout the United States [11], and that during said time the railway companies, appellants, had been engaged in the business, among others, of transporting the lemons of appellees as common carriers for hire from

points in the state of California to various points in the United States outside of said state [11].

That in the fall of 1902 appellants put into effect a flat rate of $1.00 per hundred pounds on lemons in carload lots during the months of December to April, inclusive, and afterwards in 1904 said rate was made to apply all the year, and that this was done by appellants on the representation of the lemon growers that such rate was necessary then to save the lemon industry from destruction [20-21].

That appellants had filed with the Interstate Commerce Commission a supplement No. 2 to Transcontinental Freight Bureau east-bound tariff No. 7-B (I. C. C. No. 894), and Transcontinental Freight Bureau east-bound tariff No. 3-H (I. C. C. No. 906), which increased the rate on lemons in carload lots from $1.00 to $1.15 per hundred weight, which increase would, unless prevented by injunction, go into effect as to all points in Minnesota, North Dakota, South Dakota and Manitoba on November 15, 1909, and as to all other points in the United States on December 6, 1909 [26-27].

That the tariffs mentioned were unlawful, and if carried into effect would demoralize the lemon industry of California, depreciate the value of lemon crops and lemon lands owned by appellees, prevent them from disposing of their crop and cause the business of appellees to be conducted at a loss to their irreparable injury and damage, the exact amount of which is incapable of estimation, but will exceed in amount many millions of dollars [27, 29, 34].

That the increased rate is unreasonable, unjust, vexa-

tious, excessive and extortionate, as well as discriminating, and arbitrarily imposed by appellants, and will result in undue and unreasonable prejudice, preference and advantages to persons other than appellees [31].

That the act of appellants in raising the rate on lemons constitutes a conspiracy in restraint of trade in violation of act of congress known as "An act to protect trade and commerce against unlawful restraint and monopoly," known as the Sherman Act [33]; and are also in violation of an act known as "An act to regulate commerce," approved February 4, 1887, and the acts amendatory thereof and supplemental thereto [31]; and that the enforcement of such increased rate will deprive appellees and each of them of their property and property rights without due process of law [33].

That appellees had filed their complaint before the Interstate Commerce Commission respecting the illegal and excessive rates for transportation complained of in the bill, praying that such commission investigate the matter and find and determine that the said proposed tariff increases are unjust and unreasonable. But that a hearing on said complaint could not be had in all probability for at least one year [35].

The prayer of said bill is that appellants "be immediately enjoined * * * until the final disposition by said Interstate Commerce Commission of said complaint, and until the further order of this court, from charging, demanding, exacting or collecting from any of your orators or any other persons, firms or corporations similarly situated, who may be allowed to intervene herein, any of the proposed increased tariff rates or charges * * *

and from charging * * * any rates or charges for any such purpose in excess of the present tariff; * * * and be likewise further enjoined and restrained from carrying out or consummating, or taking any steps or measure to carry out or consummate the unlawful conspiracy and confederacy herein charged against said defendants, and that upon the final hearing hereof such injunction be made permanent and perpetual, and that it be decreed that said proposed increased tariffs are, and each of them is, unauthorized and illegal" [38].

Upon this bill an order to show cause and a restraining order was issued [46-48], and on the day named therein appellants appeared specially for the purpose of filing and did each file a plea to said bill [59-62, 64-67, 68-71]. These pleas being similar to each other and raising the same questions—the questions arising upon this appeal —we set one of them forth quite fully.

"The Atchison, Topeka and Santa Fe Railway Company, one of the defendants in the above entitled suit, specially appearing under protest for the purpose of this plea to the jurisdiction of this court under the bill for injunction filed in the above entitled suit and for no other, says:

"1. That it is not a corporation organized under the laws of the state of California nor is it a citizen or inhabitant of the state of California, nor is it a citizen or inhabitant of the southern district of California, nor does it reside in said state nor in said district, but that it is a corporation organized under the laws of the state of Kansas and an inhabitant of said state of Kansas, and residing at Topeka, in the district of Kansas, where its

corporate meetings are held and its corporate business transacted; that the defendant Southern Pacific Company is not a citizen or a resident of the state of California, nor is it a citizen or inhabitant of the southern district of California, nor does it reside in said state or in said district; but it is a corporation organized under the laws of the state of Kentucky and is an inhabitant of said state of Kentucky; that the defendant the San Pedro, Los Angeles and Salt Lake Railroad Company is not a corporation organized under the laws of the state of California, nor is it a citizen or inhabitant of the state of California, nor is it a citizen or inhabitant of the southern district, nor does it reside in said state or in said district; but it is a corporation organized under the laws of the state of Utah and is an inhabitant of said state of Utah; and that it appears on the face of the bill that this proceeding is a civil suit wherein the jurisdiction is not founded only on the fact that the action is between citizens of different states, but is also based upon acts of congress relating to interstate commerce, and the bill alleges a cause of action thereunder.

"2. That this court has no jurisdiction to determine whether a rate published by defendants as required by law is reasonable or unreasonable prior to the determination thereof by the Interstate Commerce Commission, but that such jurisdiction is vested exclusively in the Interstate Commerce Commission by the act of congress approved February 4, 1887, entitled 'An act to regulate commerce,' and the acts amendatory thereof and supplemental thereto.

"That the rates complained of in the bill are joint

through rates over the lines of the defendants and their eastern connections, and it is shown by the bill that said joint through rates are made by these defendants with said connections by contract; that the evidence of the contract for said joint through rates consist of the tariffs filed in accordance with law by one or more of the parties to the contract and the concurrence, in writing, of the remaining parties to the contract who are named in the joint tariff; that the connecting carriers of the defendants referred to in the bill as parties to said joint contracts are indispensable parties to this proceeding to annul or suspend said contract; that the jurisdiction of this court sitting in equity is limited and depends upon the citizenship of the parties or whether the controversy arises under the laws of the United States, and is purely *in personam,* and this court is without jurisdiction to make any order or decree which would affect the rights of said parties who are not and cannot be made subject to its jurisdiction, and any order or decree made by this court in the absence of such indispensable parties would necessarily affect injuriously the rights of these defendants.

"Wherefore, insisting upon its exemption from suit in this court, it says that this court has no jurisdiction in the premises" [59-62].

The pleas filed as aforesaid were denied [293-296] and the Southern Pacific Company and the Salt Lake Company filed demurrers to the bill which raised, among others, the same questions as those raised by the pleas [73-77, 78-82]. These demurrers were by the court over-

ruled [304]. Thereupon the Atchison Company, without waiving any of its rights under the pleas aforesaid, and in accordance with notice by the court that the case would proceed upon its merits [296], filed an answer to the bill [84-160] and affidavits in support thereof [181-242], which answer and affidavits the Southern Pacific Company and the Salt Lake Company, without waiving their rights under their pleas and demurrers, and in accordance with said notice of the court, asked the court to consider the answer and showing of the Atchison Company as the answer and showing on their part [305].

After a hearing on the order to show cause, on the pleas, the demurrers, the answers and the affidavits above mentioned, an order was made and entered granting an injunction *pendente lite* as prayed [316-318]. From that order appellants prayed and was granted an order allowing an appeal [330-332].

From the foregoing statement and from the specification of errors hereinafter set forth it appears that the questions presented by this appeal are:

1. Does the court below obtain or have any jurisdiction of the persons of the appellant railway companies?

2. Does a court of equity have jurisdiction to enjoin or interfere with the putting into effect or with the collecting of a rate lawfully established by a railway company or railway companies prior to a determination by the Interstate Commerce Commission that it is unreasonable, unjust and excessive?

3. Did the absence of manifestly necessary parties warrant denial of the relief sought?

SPECIFICATIONS OF ERROR.

I.

That the Circuit Court erred in overruling and denying the special pleas to its jurisdiction, and in refusing to dismiss the bill, upon the ground that each of the appellants is a corporation organized and existing under the laws of states other than the state of California, and that none of the appellants were residents or inhabitants or citizens of the southern district of California, in view of the objections of each of appellants to being sued in said district.

II.

The Circuit Court erred in overruling and denying the special pleas to its jurisdiction, and in refusing to dismiss the bill, upon the ground that it appeared on the face of the bill that this proceeding is a civil suit, wherein the jurisdiction is not founded only on the fact that the action is between citizens of different states, but is also based upon acts of congress relating to interstate commerce and the bill alleges causes of action thereunder, and also that neither of appellants was a resident, inhabitant or citizen of the district in which the bill was filed.

III.

The Circuit Court erred in overruling and denying the special pleas to its jurisdiction, and in refusing to dismiss the bill, upon the ground that the rates complained of in the bill are joint through rates over the lines of the defendants (appellants) and their eastern connections,

and that it is shown by the bill that said joint through rates are made by these appellants with said connections by contract in writing, and that the connecting carriers of these appellants referred to in the bill and parties to said joint written contract were necessary and indispensable parties to this proceeding.

IV.

The Circuit Court erred in overruling and denying the special pleas to its jurisdiction and in refusing to dismiss the bill, upon the ground that it had no jurisdiction to determine whether a rate published by defendants as required by law is reasonable or unreasonable prior to the determination thereof by the Interstate Commerce Commission.

V.

The Circuit Court erred in entering the order appealed from for the reason that it commands the defendants and each of them to discriminate between shippers and persons in violation of the acts of congress approved February 4, 1887, entitled "An act to regulate commerce," and the acts amendatory thereof and supplemental thereto, by charging the appellees lower rates than these appellants and each of them, must charge under the published tariff to other shippers similarly situated who are not parties to the bill.

VI.

The Circuit Court erred in entering the decree appealed from for the reason that it commands the appellants, and each of them, to collect from the complain-

ants freight charges less than the amount shown in the tariff which are by law fixed as the only legal rates.

VII.

The Circuit Court erred in entering the decree appealed from for the reason that it appears on the face of the bill that there are omitted as parties defendant participating carriers who are parties to the joint tariff complained of and parties to the joint tariff contract under which the rates complained of were filed with the Interstate Commerce Commission and published and made the legal rates.

BRIEF ~~ON~~ OF THE ARGUMENT.

I.

The injunction should have been denied, and the bill dismissed without prejudice for want of jurisdiction of the persons of appellants.

Each appellant appeared specially and solely for the purpose of filing a plea to the jurisdiction of the court *in personam* [59-63, 64-67, 68-71].

The ground of each plea on this point was, briefly, that the suit being a civil one, not arising out of the diversity of citizenship of the parties, but out of the laws of the United States, the appellant filing it was exempt from being sued in the district in which the suit was brought, as neither it nor any other defendant was a resident, inhabitant or a citizen thereof [60, 64, 65, 69, 70].

After their pleas had been denied the Southern Pacific Company and the San Pedro, Los Angeles and Salt Lake Railroad Company filed demurrers [73-77, 78-82], and the Atchison, Topeka and Santa Fe Railway Com-

pany specially protesting, reserving and not waiving its right under its plea, filed an answer to the bill [84-128], as the court gave notice that the cause would proceed on the merits, after the disposal of the pleas and demurrers [296].

This course on the part of the appellants was the proper one to preserve the question of the jurisdiction of the person of a party to a suit.

The question of jurisdiction of the person of appellant thus being preserved, this court must hold that the Circuit Court did not have jurisdiction *in personam* in this case and direct the dismissal of the bill without prejudice, on the authority of Macon Grocery Co. v. Atlantic Coast Line Ry. Co., not yet reported, decided January 17, 1910.

For convenience of the court, and as our argument and authority of this point, we give the opinion in the Macon Grocery Company case in full here:

"This litigation was commenced on the equity side of the Circuit Court of the United States for the southern District of Georgia, by the filing on July 25, 1908, of a bill on behalf of the present appellants, all citizens of the state of Georgia, who are wholesale dealers in groceries and food products and like commodities. The defendants named in the bill are the appellees in this court, railroad corporations of states other than Georgia, viz.: the Atlantic Coast Line Railroad Company, the Louisville and Nashville Railroad Company, the Nashville, Chattanooga and St. Louis Railway Company, the Southern Railway Company, and the Cincinnati, New Orleans and Texas Pacific Railway Company.

"Briefly stated, the object of the bill was to restrain the putting into effect, by the interstate carriers just named, of proposed advances in rates on fresh meats, grain products, hay and packing house products within the territory of what is known as the Southeastern Freight Association. That territory, roughly described, embraces the states of South Carolina, Florida, Georgia, points in Tennessee, and that portion of Alabama east of a line drawn from Chattanooga through Birmingham, Selma and Montgomery to Pensacola. It was averred that freight tariffs embodying the proposed advances in rates had been filed with the Interstate Commerce Commission, that notice had been given that such tariffs would become effective on August 1, 1908, and that practically every interested line of railroad within the territory in question had joined in such tariffs as participating carriers. The advance in rates was averred to be an 'arbitrary and unlawful exaction,' and to be the direct outcome of understandings and agreements in suppression of competition and in unlawful combination in restraint of interstate trade, arrived at and made effective through the agency of the Southeastern Freight Association and other affiliated associations, and that the acts of such combinations in making the advance of rates complained of was the result of a conspiracy, unlawful as well at common law as under the statutes of the United States. Averring that to permit the going into effect of the proposed unjust and unreasonable rates would entail irreparable loss and injury to complainants and others similarly situated, would operate to the prejudice of the public interest, and would

bring about a multiplicity of suits for reparation, the bill prayed the allowance of an injunction *pendente lite,* restraining the putting into effect of the proposed advances, and that upon a final hearing a decree might be awarded perpetually enjoining such advances.

"Specially appearing for the purpose, the various defendants respectively filed a plea to the jurisdiction, each defendant asserting in substance an exemption from being sued in a district of which it was not an inhabitant. Demurrers to the pleas to the jurisdiction were sustained. Thereupon, without waiving the benefit of the pleas, defendants jointly demurred to the bill upon numerous grounds. Without specifically passing on the demurrer, the court heard the application for an injunction, upon affidavits and documents submitted on behalf of the complainants, and on August 1, 1908, announced its opinion 'sustaining the contention of the complainants and directing the injunction prayed to issue upon the condition that complainants should within ten days present their complaint to the Interstate Commerce Commission for investigation and determination of the reasonableness of the rates involved.' 163 Fed. 738. Two days afterwards an order was entered in which, among other statements, it was recited 'that the complainants, together with other persons in the cities of Atlanta, Columbus, Rome and Athens, Georgia, have this day filed with the Interstate Commerce Commission their complaint, praying the commission to investigate and determine the reasonableness of the rates involved, also to declare what are just and reasonable maximum rates.'

"The order decreed that the defendants to the action

and each of them 'be and they are hereby jointly and severally enjoined from enforcing collection of the advance in rates made effective August 1st, 1908, from Ohio and Mississippi river crossings, Nashville, Tennessee, and points with relation thereto, to all points within the state of Georgia, on classes B, C, D and F, fresh meats, C, L, grain products, hay products, hay and packing house products; this injunction to continue and remain in force pending an investigation and determination of the reasonableness of the rates involved, by the Interstate Commerce Commission, or until further order of the court.'

"Thereupon an appeal was taken to the Circuit Court of Appeals for the fifth circuit. It was there held that the case presented 'for necessary consideration the proper construction of the act to regulate commerce,' and that the jurisdiction of the court did not rest solely upon the diversity of citizenship of the parties. The court, being of opinion 'that the sound construction of the different provisions of the act to regulate commerce as amended and now in force, necessarily forbid the exercise of the jurisdiction attempted to be invoked by the bill,' reversed the decree of the Circuit Court and remanded the case to that court with instructions to dismiss the bill without prejudice.

"Assignments of error, eighteen in number, have been filed, wherein, in various forms of statements, appellants assail the action of the Circuit Court of Appeals in adjudging that the Circuit Court was without jurisdiction over the subject-matter of the bill. The appellees also, in the argument at bar, press upon our notice, as they did below, the claims made in the special pleas to the juris-

diction filed in the Circuit Court. It is, of course, the duty of this court to see to it that the jurisdiction of the Circuit Court was not exceeded (Louisville & Nashville R. R. Co. v. Mottley, 211 U. S. 149, 152, and cases cited), and we shall dispose of the case before us by considering and deciding the last mentioned contention. The basis of the claim that the Circuit Court had not acquired jurisdiction over the person of the defendants was that none of the defendants was an inhabitant of the district in which the suit was brought, and that the suit being one 'wherein the jurisdiction is not founded only on the fact that the action is between citizens of different states, but is based also upon the acts of congress of the United States, relating to interstate commerce and alleged causes of action arising thereunder,' the defendant could not be sued outside of the district of which it was an inhabitant. As cause of demurrer to the pleas the complainants stated 'that the controversy presented by the bill is wholly between citizens of different states, and is solely founded upon diversity of citizenship.' While sustaining the demurrer the Circuit Court yet declared:

" 'It is true that in this case the illegality of the alleged increase in rates must necessarily, in large measure, be determined by the federal law. The legality or illegality of the alleged combination in restraint of trade must be determined by the same law, and it seems to be conceded that, generally speaking, this court would not have jurisdiction of these questions finally except under conditions which do not exist here. That is to say, the court can only, for final determination, entertain the

federal question in the district of which the defendants are inhabitants.'

"Despite these views, however, as the court considered, if the averments of the bill were taken as true, there was 'a threatened and immediate violation of the federal law of the gravest character to a large number of people,' irreparable injury would be occasioned if the increase in rates was allowed to go into effect, and as there was not time for those affected to have protection or seek recourse elsewhere, jurisdiction was entertained for the purpose of giving temporary relief.

"The pertinent section of the statute regulating the original jurisdiction of circuit courts of the United States is the first section of the act of March 3, 1875, ch. 137, as amended by the act of March 3, 1887, ch. 373, as corrected by the act of August 13, 1888, ch. 866, 25 Stat. 433, reading as follows:

" 'That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the constitution or laws of the United States, * * * or in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid. * * * But * * * no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded

only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or of the defendant.'

"In Patton v. Brady, 184 U. S. 608, discussing the question as to when a case may be said to arise under the constitution of the United States, the court observed:

" 'It was said by Chief Justice Marshall that "a case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the constitution or a law of the United States whenever its correct decision depends upon the construction of either" (Cohen v. Virginia, 6 Wheat. 264, 379); and again, "when the title or right set up by the party may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction." Osborn v. Bank of U. S., 9 Wheat 738, 822. See also Little York Cold-Washing and Water Company v. Keyes, 96 U. S. 199, 201; Tennessee v. Davis, 100 U. S. 257; White v. Greenhow, 114 U. S. 307; New Orleans, M. & T. R. Co. v. Mississippi, 102 U. S. 135, 139.'

"In Tennessee v. Davis, 100 U. S. 257, the court said:

" 'What constitutes a case arising under the laws of the United States was early defined in the case cited from 6 Wheaton (Cohens v. Virginia). It is not merely where a party comes into court to demand something conferred upon him by the constitution or by a law or treaty. A case consists of the right of one party as well as the other, and may truly be said to arise under the constitution or a law or a treaty of the United States

whenever its correct decision depends upon the construction of either. Cases arising under the laws of the United States are such as grow out of the legislation of congress, whether they constitute the right or privilege, or claim the protection, or defense of the party, in whole or in part, by whom they are asserted. Story, Const., section 1647; Cohens v. Virginia, 6 Wheat. 379. It was said in Osborn v. Bank, 9 Wheat. 823, when a question to which the judicial power of the United States is extended by the constitution forms an ingredient of the original cause, it is in the power of congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it. And a case arises under the laws of the United States when it arises out of the implication of the law.'

"In cases of the character of the one at bar the rulings of the lower federal courts have uniformly been to the effect that they arose under the constitution and laws of the United States. Tift v. Southern Railway Co., 123 Fed. 789, 793; Northern Pacific Ry. Co. v. Pacific etc. Ass'n., 165 Fed. 1, 9; Memphis Cotton Oil Co. v. Illinois Central R. R. Co., 164 Fed. 290, 292; Imperial Colliery Co. v. Chesapeake & O. Ry. Co., 171 Fed. 589. And see Sunderland Bros. v. Chicago, R. I. & P. Ry Co., 158 Fed. 277; Jewett Bros. v. C. M. & St. P. Ry. Co., 156 Fed. 160. We are of opinion that the case before us may properly be said to be one arising under a law or laws of the United States. As said by Taft, circuit judge, in Toledo, A. A. & N. N. Ry. Co. v. Pennsylvania Co. *et al.,* 54 Fed. 730:

" 'It is immaterial what rights the complainant would

have had before the passage of the interstate commerce law. It is sufficient that congress, in the constitutional exercise of power, has given the positive sanction of federal law to the rights secured in the statute, and any case involving the enforcement of those rights is a case arising under the laws of the United States.'

"The object of the bill was to enjoin alleged unreasonable rates, threatened to be exacted by carriers subject to the act to regulate commerce. The right to be exempt from such unlawful exactions is one protected by the act in question, and the purpose to avail of the benefit of that act, as well as of the anti-trust act, is plainly indicated by the averments of the bill. Of necessity, in determining the right to the relief prayed for, a construction of the act to regulate commerce was essentially involved.

"The jurisdiction of the Circuit Court not being invoked solely upon the ground of diversity of citizenship, it inevitably follows that, as there was no waiver of the exemption from being sued in the court below, that court was without jurisdiction of the persons of the defendants. *In Re* Keasbey & Mattison Co., 160 U. S. 222; *In Re Moore,* 209 U. S. 490; Western Loan Co. v. Butte & Boston Min. Co., 210 U. S. 368. In the first case, the question involved was as to the jurisdiction of the United States Circuit Court for the Southern District of New York over an action brought in that court by a corporation of Pennsylvania against a corporation of Massachusetts, having its principal place of business in New York city, for infringement of a trade mark. In the course of the opinion it was said (pp. 228, 229, 230):

" 'But when this suit was brought, the first section

of the judiciary act of 1875 had been amended by the act of March 3, 1887, chap. 373, as corrected by the act of August 13, 1888, chap. 866, in the parts above quoted, by substituting for the jurisdictional amount of $500, exclusive of costs, the amount of $2,000, exclusive of interest and costs; and by striking out, after the clause: "and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant," the alternative, "or in which he shall be found at the time of serving such process or commencing such proceeding," and by adding, "but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." 24 Stat. at L. 552; 25 Stat. at L. 433.

" 'The last clause is added by way of proviso to the next preceding clause, which, in its present form, forbids any suit to be brought in any other district than that of which the defendant is an inhabitant; and the effect is that, in every suit between citizens of the United States, when the jurisdiction is founded upon any of the grounds mentioned in this section, other than the citizenship of the parties, it must be brought in the district of which the defendant is an inhabitant; but when the jurisdiction is founded only on the fact that the parties are citizens of different states, the suit shall be brought in the district of which either party is an inhabitant. And it is established by the decisions of this court that, within the meaning of this act, a corporation cannot be considered a citizen, an inhabitant, or a resident of a state

in which it has not been incorporated; and, consequently, that a corporation incorporated in a state of the Union cannot be compelled to answer to a civil suit, at law or in equity, in a circuit court of the United States held in another state, even if the corporation has a usual place of business in that state. McCormick Harvesting Mach. Co. v. Walthers, 134 U. S. 41, 43; *Ex Parte* Shaw, 145 U. S. 444. Those cases, it is true, were of the class in which the jurisdiction is founded only upon the fact that the parties are citizens or corporations of different states. But the reasoning on which they proceeded is equally applicable to the other class, mentioned in the same section, of suits arising under the constitution, laws, or treaties of the United States; and the only difference is that, by the very terms of the statute a suit of this class is to be brought in the district of which the defendant is an inhabitant, and cannot, without the consent of the defendant, be brought in any other district, even in one of which the plaintiff is an inhabitant.

* * * * * * *

" 'This suit, then, assuming it to be maintainable under the act of 1881, is one of which the courts of the United States have jurisdiction concurrently with the courts of the several states. The only existing act of congress which enables it to be brought in the Circuit Court of the United States is the act of 1888. The suit comes within the terms of that act, both as arising under a law of the United States and as being between citizens of different states. In either aspect, by the provisions of the same act, the defendant cannot be compelled to answer in a district of which neither the defendant nor

the plaintiff is an inhabitant. The objection, having been seasonably taken by the defendant corporation, appearing specially for the purpose, was rightly sustained by the Circuit Court.'

"We are of opinion that the jurisdictional statute of 1888 is applicable, even upon the assumption that the cause of action was alone cognizable in a court of the United States, as the particular venue of the action was not provided for elsewhere than in that statute.

"The pleas to the jurisdiction of the Circuit Court having been seasonably made, should have been sustained and the bill dismissed, without prejudice, for want of jurisdiction over the persons of the defendant. As, however, practically the same result will be reached by the decree entered in the Circuit Court of Appeals, which ordered the reversal of the decree of the Circuit Court, and remanded the cause, with instructions to dismiss the bill without prejudice, we affirm that decree without expressing an opinion as to the merits of the reasoning upon which it was based."

II.

As the allegations of the bill filed by appellees makes the relief sought substantially if not wholly depend upon whether the rate on lemons complained of therein is reasonable or unreasonable, just or unjust, excessive or not excessive, that relief should have been denied and the bill dismissed without prejudice.

This point is based upon specification of error IV herein, and specification IV, page 327 of the transcript of record.

Let it be assumed for the sake of the argument that jurisdiction of the persons of the appellants was acquired by the court still the bill should have been dismissed.

As this Honorable Court in what are known as the northern lumber cases has held against our position set forth in the heading of this subdivision of our brief, we would not have specified the error to which it refers or suggested the point herein but for the fact that we earnestly believe that this Honorable Court will no longer follow the rule it announced in those decisions, on account of a decision rendered by the Supreme Court of the United States January 10, 1910, in the case of the Baltimore & Ohio Railroad Company *et al.* v. United States of America *ex rel.* Pitcairn Coal Company *et al.*, not yet published in any report or advance sheet thereof so far as we are able to ascertain.

We quote fully from the opinion in the case last referred to as follows:

"One of the assignments of error assails the correctness of the conclusion of the court below to the effect that, compatibly with the act to regulate commerce,

there was power under the circumstances disclosed by the record to consider the subject-matters which were complained of, and to award the relief concerning them which was prayed. Indeed, the nature of the controversy and the relief which it requires is such that, even without the assigned error, to which we have referred, the question at the very threshold necessarily arises and commands our attention as to whether there was power in the court, under the circumstances disclosed by the record, to grant the relief prayed consistently with the act to regulate commerce, and to that subject we therefore at once come.

"To a consideration of this question it is essential to at once summarily and accurately fix the subject-matter of the alleged grievances and the precise character of the relief required in order to remedy the evils complained of upon the assumption of their existence. As to the first, it is patent that the grievances involve acts of the Baltimore and Ohio Railroad, regulations adopted by that company and alleged dealings by the other corporations, all of which, it is asserted, concern interstate commerce, and all of which, it is alleged, are in direct violation of the duty imposed upon railroad companies by the provisions of the act to regulate commerce. As to the second, in view of the nature and character of the acts assailed, of the prayer for relief which we have previously excerpted, and of the relief which the court below directed to be awarded, it is equally clear that a prohibition, by way of mandamus, against the act is sought and an order, by way of mandamus, was invoked, and was allowed, which must operate, by judicial decree, upon all

the numerous parties and various interests as a rule or regulation as to the matters complained of for the conduct of interstate commerce in the future. When the situation is thus defined, we see no escape from the conclusion that the grievances complained of were primarily within the administrative competency of the Interstate Commerce Commission and not subject to be judicially enforced, at least until that body, clothed by the statute with authority on the subject, had been afforded by a complaint made to it, the opportunity to exert its administrative functions.

"The controversy is controlled by the considerations which governed the ruling made in Texas and Pacific Railroad Company v. Abilene Cotton Oil Co., 204 U S. 426. In that case suit was brought in a court of the state of Texas to recover, because of an exaction by the carrier, on an interstate shipment, of an alleged unreasonable rate, although the rate charged was that stated in the schedule duly filed and published in accordance with the act to regulate commerce. After great consideration, it was held that the relief prayed was inconsistent with the act to regulate commerce, since by that act the rates, as filed, were controlling until they had been declared to be unreasonable by the Interstate Commerce Commission on a complaint made to that body. It was pointed out that any other view would give rise to inextricable confusion, would create unjust preferences and undue discriminations, would frustrate the purposes of the act, and, in effect, cause the act to destroy itself. The ruling there made dealt with the provisions of the act as they existed prior to the amendment

adopted in 1906, and when those amendments are considered, they render, if possible, more imperative the construction given to the act by that ruling, since, by section 15, as enacted by the amendments of June 29, 1906, the commission is empowered, indeed it is made its duty, in disposing of a complaint, not only to determine the legality of the practice alleged to give rise to an unjust preference or undue discrimination, and to forbid the same, but, moreover, to direct the practice to be followed as to such subject for a fixed period, not exceeding two years, with power in the commission, if it finds reason to do so, to suspend, modify, or set aside the same, the order, however, to become operative without judicial action. In considering section 15 in the case of Illinois Central Railroad Company v. Interstate Commerce Commission, just decided, it was pointed out that the effect of the section was to cause it to come to pass that courts, in determining whether an order of the commission should be suspended or enjoined, were without power to invade the administrative functions vested in the commission and therefore could not set aside an order duly made on a mere exercise of judgment as to its wisdom or expediency. Under these circumstances it is apparent, as we have said, that these amendments add to the cogency of the reasoning which led to the conclusion in the Abilene case, that the primary interference of the court with the administrative functions of the commission was wholly incompatible with the act to regulate commerce. This result is easily illustrated. A particular regulation of a carrier engaged in interstate commerce is assailed in the courts as unjustly preferen-

tial and discriminatory. Upon the facts found the complaint is declared to be well founded. The administrative powers of the commission are invoked concerning a regulation of like character upon a similar complaint. The commission finds, from the evidence before it, that the regulation is not unjustly discriminatory. Which would pervail? If both, then discrimination and preference would result from the very presence of the two methods of procedure. If, on the contrary, the commission was bound to follow the previous action of the court, then it is apparent that its power to perform its administrative function would be curtailed, if not destroyed. On the other hand, if the action of the commission was to prevail, then the function exercised by the court would not have been judicial in character, hence its final conclusion would be susceptible of being set aside by the action of a mere administrative party. But that these illustrations are not imaginary is established not only by this record but by the record in the case of the Illinois Central Railroad Company v. Interstate Commerce Commission.

"'* * * As it was settled in the Abilene case that the right to question in the courts the rates established in accordance with the act to regulate commerce without previous resort, by complaint, to the commission, in order to determine their unreasonableness, would be destructive of the act, and therefore was not permissible, that ruling is equally applicable to the provision as to furnishing cars contained in section 23, which is here relied upon. But as we are required for the determination of the case now before us to consider the scope of

the act to regulate commerce as now existing, as a result of the amendments of 1906, we shall not rest our conclusion alone upon the persuasive force of the reasoning which constrained to the conclusion announced in the Abilene case. Speaking generally, it is truth to say, that prior to 1889, although the prohibitions of the act to regulate commerce as to preferences and discriminations were far reaching, the mechanism provided by the statute for the enforcement of orders of the commission on the subject, as well as those concerning a finding as to unreasonable rates, were deemed to be in many respects ineffective, or at least tardy in operation or unsatisfactory in prompt remedial results, and this because immediate effect was not given to the orders of the commission, but the aid of judicial authority was required for a pre-requisite for such results. Section 23, here relied upon, was not part of the original act, but, as we have said, was added thereto on March 2, 1889, for the obvious purpose of making the remedial processes of the act more speedy and efficacious. Now, it cannot in reason be questioned, that among the purposes contemplated by the amendments adopted in 1906 was the curing of the presumed remedial inefficiency of the act by supplying efficient means for giving effect to the orders of the commission, made in the exertion of the authority conferred upon that body. To that end one of the amendments, section 15, gives operative effect to the orders of the commission without the sanction of previous judicial authority, and endows that body with the power, not only as to unreasonable rates, but as to practices found upon complaint to be unduly prejudicial and un-

justly discriminatory, to correct the same by its order, which order should have effect within the period fixed in the statute, and to enforce its provisions, penalties and forfeitures are provided. Section 16. It being demonstrable, as we have seen, that to give to section 23 the broad meaning which the court below affixed to it would be to destroy or render inefficacious the remedial purposes of the amendments enacted in 1906, it must follow that such construction cannot be adopted, since to do so would compel us to hold that the wide and far reaching remedies, created by the amendments of 1906, were, in effect, destroyed by the narrower remedial processes which had been previously enacted in 1889. This conclusion being in reason impossible, it must follow that, construing the provisions of section 23 in the light of and in harmony with the amendments adopted in 1906, the remedy afforded by that section, in the cases which it embraces, must be limited either to the performance of the duties which are so plain and so independent of previous administrative action of the commission as not to require a pre-requisite exertion of power by that body, or to compelling the performance of duties which plainly arise from the obligatory force which the statute attaches to orders of the commission, rendered within the lawful scope of its authority, until such orders are set aside by the commission or enjoined by the courts.

"Nor is there anything in the contention that the decision in Southern Ry. Co. v. Tift, 206 U. S. 428, qualifies the ruling in the Abilene case, and is an authority supporting the right to resort to the courts in advance of action by the commission for relief against unreasonable

rates or unjust discriminatory practice, which, from their nature, primarily require action by the commission. * * * The judgment of the Circuit Court of Appeals is reversed, and the cause is remanded to the Circuit Court with directions to set aside its judgment, and enter judgment dismissing the petition."

III.

The relief sought by the appellees should have been denied account of absence of manifestly necessary parties.

Even if we admit that which we do not, namely, that the court had jurisdiction of the persons of the appellant railway companies, still we insist that the relief sought and granted should have been denied.

It appears from the face of the bill that appellees asked the court to interfere with the enforcement and collection of a *through joint rate* for the interstate transportation of lemons, established, according to the allegations of the bill, by appellant railroad companies through contracts or arrangements with other carriers connecting directly or indirectly with their lines of railroad at various terminal and junction points [11].

That appellants and their said connecting lines had a right to establish the rates by contract as alleged in the bill has been decided by the Supreme Court of the United States in the case of Southern Pacific Co. v. Interstate Commerce Commission, 200 U. S. 536, 50 L. Ed. 585, in which it is said:

"It is conceded that the different railroads forming a continuous line of road are free to adopt or refuse to

adopt joint through tariff rates. The commerce act recognizes such right and provides for the filing with the commission of the through tariff rates as agreed upon between the companies. The whole question of joint through tariff rates, under the provisions of the act, is one of agreement between the companies, and they may or may not enter into it, as they may think their interests demand. And it is equally plain that an initial carrier may agree upon joint through rates with one or several connecting carriers, who, between each other, might be regarded as competing roads."

It follows, then, that appellees in a proceeding against a portion *only* of parties to a contract ask in effect that the entire contract be nullified and abrogated.

In such cases it has been held that the other parties to the contract are necessary parties to the suit.

In the case of Southern Pacific Company v. Interstate Commerce Commission, 200 U. S. 536, 50 L. Ed. 585, on this point the court said:

"Where a person is so related to the subject-matter of a suit in equity that his rights must unavoidably be passed on by the court in reaching a final decree, he is a necessary party."

In such cases relief has been denied.

In Minnesota v. Northern Securities, 184 U. S. 199, 46 L. Ed. 499, the court said:

"And the established practice of courts of equity to dismiss the plaintiff's bill if it appears that to grant the relief prayed for would injuriously affect persons materially interested in the subject-matter, who are not

made parties to the suit, is founded upon clear reasons, and may be enforced by the courts *sua sponte,* though not raised by the pleadings."

And in the same case it was said:

"Where the bill discloses that the parties to be affected by the decision of the controversy are not all before the court, the bill will be dismissed."

In the case of Consolidated Water Company v. Babcock, 76 Fed. 243, on this point the court said:

"They are there said to be persons who not only have an interest in the controversy but an interest of such a nature that a final decree could not be made without either affecting that interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience * * * but as the decree cannot bind them, the court cannot, for that reason, afford the relief asked to the other party."

IV.

Petition for Certification to Supreme Court.

In the foregoing subdivisions of this brief appellants respectively and earnestly submit that they have shown abundant and conclusive reason for reversal of the action of the lower court and therefore pray such judgment of this Honorable Court.

But if for any reason this court should decide that the lower court acquired jurisdiction of the persons of appellants, then, in view of the extreme importance of this

case to all concerned, the great necessity of a speedy determination of this litigation and of the diversity of opinion in the published reports as to the jurisdiction of the subject-matter of this action, we respectfully request that this Honorable Court certify to the Supreme Court of the United States for decision the question whether or not a court of equity has jurisdiction to enjoin the collection and enforcement of an interstate rate duly established, posted, published and filed with the Interstate Commerce Commission in advance of a decision by said commission as to the reasonableness or unreasonableness of such rate.

The grounds of this request are above indicated, but we here elaborate them somewhat.

The extreme importance of an early decision is apparent from the record in this case.

The great necessity for an early determination of this litigation is made manifest by the allegations of the bill.

The diversity of opinion on this question in the reported cases are illustrated by the cases following:

Against such jurisdiction are:

Pottlatch Lumber Co. v. Spokane etc. Ry. Co. 157 Fed. 588, Judge Whitson;

Atlantic Coast Line R. Co. v. Macon Grocery Co (C. C. A.), 166 Fed. 206, Judges McCormick Pardee; Judge Shelby dissented;

Columbus I. & S. Co. v. R. Co., 171 Fed. (C. C.) 713, Judge Keller;

Houston C. & C. Co. v. Norfolk etc. R. Co. (C. C.), 171 Fed. 723, Judge McDowell;

Baltimore & O. R. Co. v. U. S. *ex rel.* Pitcairn Coal Co., decided by U. S. Supreme Court June 10, 1910, not yet reported.

The cases for such jurisdiction are:

Jewett Bros. v. Chicago etc. R. Co. (C. C.), 156 Fed. 160, Judge Carland;

Kalispell Lumber Co. v. Great Northern R. Co. (C. C.), 157 Fed. 845, Judge Hunt;

M. C. Kiser Co. v. Central R. Co. (C. C.), 158 Fed. 193, Judge Newman;

Macon Grocery Co. v. Atlantic R. Co. (C. C.), 163 Fed. 738, Judge Speer;

Northern Pac. R. Co. v. Pacific Coast L. M. & A. Co. (C. C. A.), 165 Fed. 1, Judges Gilbert and Morrow;

Northern Pac. R. Co. v. Oregon etc. L. M. & A. (C. C. A.), 165 Fed. 13, Judges Gilbert and Morrow; Judge Ross dissenting.

For the reasons herein we respectfully submit that the action of the lower court should be reversed, with directions that the bill be dismissed without prejudice, and in case this court should think that such relief should not

be granted, then that our petition for certification to the Supreme Court of the United States be granted.

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